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No. 91-481

In The
Supreme Court of the United States

October Term, 1991

VICTOR C. BARIS, et al.,

Petitioners,

versus

CALTEX PETROLEUM, INC.,
CALTEX PETROLEUM CORPORATION,
and CALTEX OIL CORPORATION,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

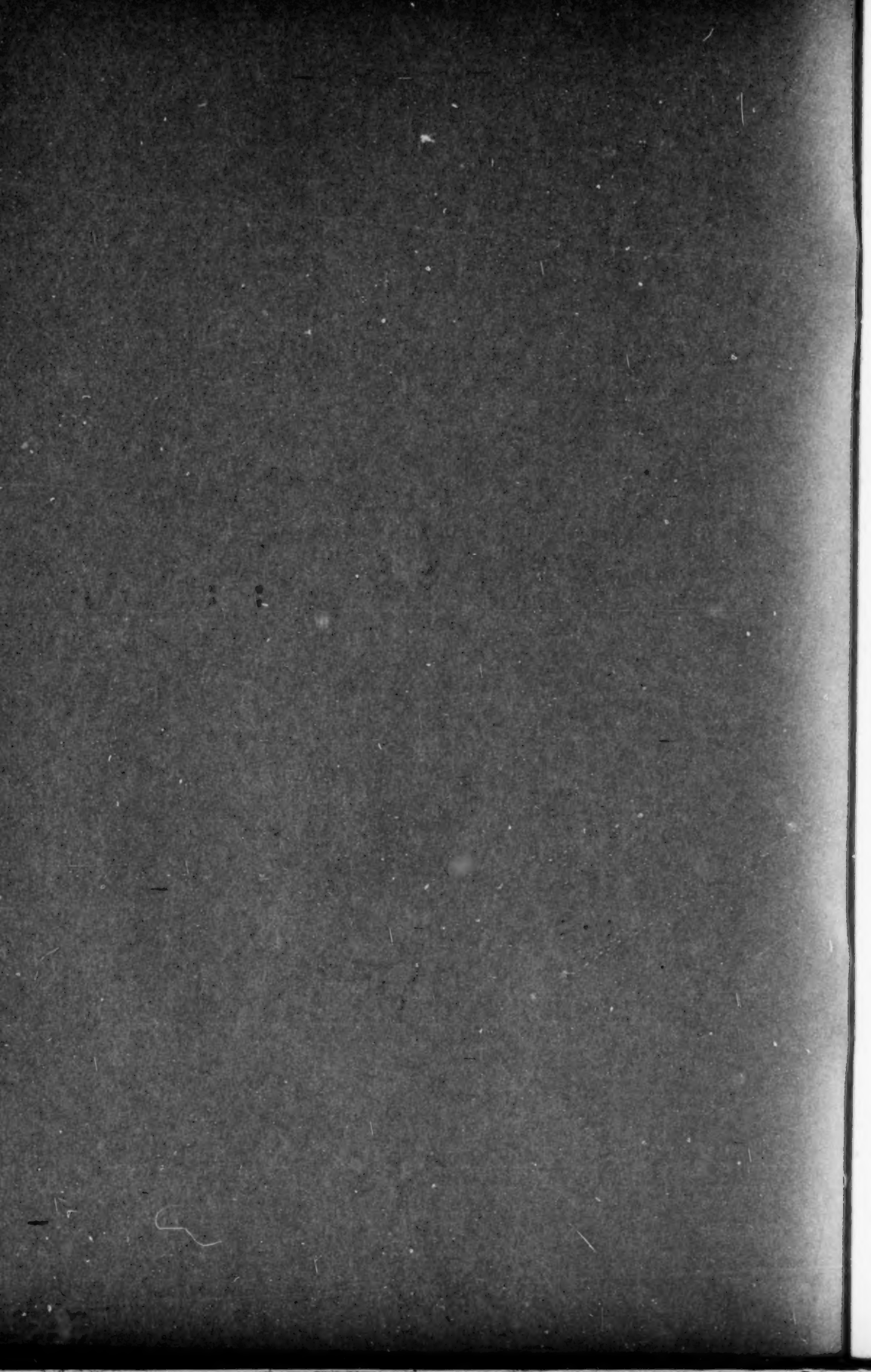
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QUESTIONS PRESENTED FOR REVIEW

1.

Did the Fifth Circuit correctly interpret 28 U.S.C. § 1447(c), as amended in 1988, as meaning that failure to move to remand a case within 30 days after its removal from state court waives any ground for remand other than lack of subject matter jurisdiction?

2.

If a suit under the Death on the High Seas Act has been removed from state to federal court, and plaintiffs have waived any right to have the case remanded, is the case properly heard on the "admiralty" side of the federal court?

LIST OF PARTIES

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Bulig-Bulig Kita Kamaganak Association	
Renato Asistorga	
Pedro B. Sorima	
Arnel N. Galang	
Elsa Montiagodo	
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Isabel Magno	
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Violeta Sabulao Faiyaz	
Julieta Benaso	
Ecolasitca Baldo	
Jose Baguhin	Petitioners
Caltex Petroleum, Inc.	
Caltex Petroleum Corporation	
Caltex Oil Corporation	Respondents
Sulpicio Lines, Inc.	
Caltex Philippines, Inc.	
Caltex Asia, Limited	
California Texas Oil Corporation	
Caltex Philippines Petroleum Company, Inc.	
Caltex International Limited	
Caltex International Services Limited	
Caltex Oceanic Limited	
Caltex Oil Corporation (Delaware)	
Caltex Oil Corporation (New York)	
Caltex Oil Products	
Caltex (Overseas) Limited	
Caltex Services (Philippines), Inc.	

LIST OF PARTIES - Continued

Caltex Trading and Transport Corporation
The Caltex Group
Clatraport (Far East) Company
Caltex Investment and Trading Limited
Caltex Services Corporation
American Overseas Petroleum Limited
P.T. Caltex Pacific Indonesia
Steamship Mutual Underwriting Association
(Bermuda) Limited
Vector Shipping Corporation . . . Unserved Defendants

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BRIEF IN OPPOSITION

Respondents, Caltex Petroleum, Inc., Caltex Petroleum Corporation, and Caltex Oil Corporation, file this brief in opposition to petitioners' petition for a writ of certiorari.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 932 F.2d 1540 and is reproduced in petitioners' appendix, Pet. 1a-23a.

The order of the United States District court for the Southern District of Texas is unreported and is reproduced in petitioners' appendix, Pet. 24a-27a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the proper construction of a November 19, 1988 amendment to the removal statute, 28 U.S.C. § 1447(c). The full text of the statute is reproduced in petitioners' appendix, Pet. 28a.

Petitioners contend this case also involves the proper construction of federal admiralty jurisdiction and the "saving to suitors" clause in 28 U.S.C. § 1333(1). The full text of the statute is reproduced in petitioners' appendix, Pet. 28a. Petitioners also contend the right to trial by jury as guaranteed by the Seventh Amendment to the United States Constitution is involved. The amendment is reproduced in petitioners' appendix, Pet. 28a.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete and inaccurate. They state incompletely the grounds on which they asserted jurisdiction in their state court petition, they do not accurately state the arguments they raised before the district court, and they fail to state accurately the basis of the decision by the Fifth Circuit.

Petitioners are passengers and survivors of passengers who were injured or killed when the interisland

ferry, M/V DONA PAZ, sank after colliding with a tanker, the M/T VECTOR, in waters off the Philippines. As a result of that collision, approximately 5,000 passengers aboard the interisland ferry perished or were injured. Petitioners filed suit in the District Court of Harris County Texas, naming numerous Caltex entities and other companies as defendants. The grounds of jurisdiction, as alleged in the state court petition, are as follows:

Plaintiffs bring this action against defendants pursuant to the laws of the United States, including the general maritime law, and, pursuant to the savings [sic] to suitor's [sic] clause, 28 U.S.C. § 1333(1), as well as other federal and state laws as may be applicable including § 17.031 [sic] of the Texas Civil Practices & Remedies Code.

Petitioners incorrectly state (Pet. 3) that they alleged jurisdiction simply under the saving to suitors clause and the Texas "open forum" statute, § 71.031, Tex.Civ.Prac. & Rem. Code. They also invoked "the general maritime law . . . as well as other federal . . . laws as may be applicable"

Petitioners served only three Caltex entities. Those Caltex entities timely removed the case to the United States District Court for the Southern District of Texas, Houston Division, on February 21, 1990, on federal question grounds because the only "applicable federal law" with regard to the death cases is the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 761 *et seq.* On March 2, 1990, Caltex filed a motion to dismiss for *forum non conveniens*. Under the local rules, petitioners were

required to respond within 20 days. They failed to do so. Petitioners also failed to file a motion to remand.

On April 10, 1990 the federal district court dismissed the case for improper venue. However, the grounds cited by the court were grounds typically invoked for dismissal for *forum non conveniens*. On April 16, 1990, almost two months after the case was removed, petitioners filed their first pleadings in federal court. Petitioners filed motions for new trial, for reconsideration, and for remand. They argued that the removal was not authorized by any federal statute and, therefore, the federal district court lacked subject matter jurisdiction. The sole basis for the motion to remand was that the federal district court lacked subject matter jurisdiction.

On June 13, 1990, the district court denied petitioners' motions but amended its previous order to show that dismissal was for *forum non conveniens*. The court denied the motion to remand based on a lack of subject matter jurisdiction. The court reasoned that although no statute authorizes the removal of DOHSA cases, such cases are nevertheless within the subject matter jurisdiction of the federal district court because DOHSA cases can be filed initially in federal court. Consequently, the court ruled it had subject matter jurisdiction, and the court then dismissed for *forum non conveniens*.

Petitioners appealed to the Court of Appeals for the Fifth Circuit. Petitioners continued to argue that because no statute authorized the removal of the case the federal district court was without subject matter jurisdiction. In response, Caltex pointed out that even if the removal of the case was unauthorized, that did not equate with a

lack of subject matter jurisdiction. Caltex also pointed out that to the extent petitioners were arguing the case should have been remanded simply because removal was not authorized by statute, such objection was waived under 28 U.S.C. § 1447(c) as amended in 1988, because the statute provides that any defect other than lack of subject matter jurisdiction is waived if no motion to remand is made within 30 days of removal. Finally, Caltex argued that removal of DOHSA cases is authorized because such cases arise under a federal statute and, thus, are cases arising under federal law for purposes of the removal statute.

The Fifth Circuit did not reach the issue of whether DOHSA cases are subject to removal as cases arising under federal law.¹ The Fifth Circuit affirmed the district court's denial of petitioners' motion to remand based on a lack of subject matter jurisdiction. The court observed that the mere fact that removal of a case is not authorized by statute cannot be equated with a lack of subject matter jurisdiction and that petitioners' argument to the contrary was confused and erroneous. The Fifth Circuit ruled the district court had subject matter jurisdiction because the case could have been filed initially in federal district court. Further, the Fifth Circuit ruled that to the extent the petitioners were seeking a remand on the ground that removal was not authorized by statute, petitioners had

¹ Because the Fifth Circuit found it unnecessary to decide whether DOHSA cases are subject to removal, Pet. 5a, we do not address that question. However, Caltex continues to contend that DOHSA cases are federal-question cases and removable to federal court under 28 U.S.C. §§ 1331 and 1441(b).

waived remand on that ground by failing to move to remand within 30 days. Moreover, the court ruled that the petitioners' pleadings clearly invoked a DOHSA remedy and remedies under the general maritime law, thereby placing the case on the admiralty side of federal district court. The Fifth Circuit ruled, however, that the district court had failed to properly set forth the reasons for the dismissal for *forum non conveniens*, and the Fifth Circuit remanded for further development of that issue.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Decision of the Fifth Circuit is Clearly Correct.

Prior to its amendment in 1988, 28 U.S.C. § 1447(c) provided:

If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of costs.²

² The Judiciary Act of 1875 had provided that if "at any time" the trial court became satisfied that a case commenced in or removed to federal court did not "really and substantially involved a dispute properly within the jurisdiction" of the court, the action was to be either dismissed or remanded to the court from which it was removed. 18 Stat. 472. That provision was not changed in 1887, but an additional statute was adopted that year providing that "improvidently removed" cases shall be remanded. Act of March 3, 1887, c. 373, 24 Stat. 553. Both of these provisions were included in the 1911 Judicial Code and endured until the adoption of the 1948 Judicial Code. Section 1447(c) was rewritten and took the form in the text in 1949. Act of May 24, 1949, c. 139, § 84, 63 Stat. 102.

As amended by Act of Nov. 19, 1988, Pub.L. 100-702, title X, § 1016(a), 102 Stat. 4669, the statute now provides in relevant part:

A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.

Two separate panels of the Fifth Circuit have construed the new statute as meaning that the 30-day limit on motions to remand applies to all motions to remand "except in cases in which the court lacks subject matter jurisdiction." This was the holding in this case, Pet. 10a, as it had been by a different panel in *In re Shell Oil Co.*, 932 F.2d 1523, 1527 n.6 (5th Cir. 1991) ("*Shell II*"). The other panel had said in another case that "any defect in removal procedure" means "all non-jurisdictional defects existing at the time of removal." *In re Shell Oil Co.*, 932 F.2d 1518, 1521-1522 (5th Cir. 1991) ("*Shell I*").

There is an apparent conflict between this construction of the statute and the construction given to it by the Third Circuit in *Foster v. Chesapeake Ins. Co.*, 933 F.2d 1207 (3d Cir. 1991) (petition for certiorari filed Aug. 16, 1991, No. 91-287). The Third Circuit's reading of the statute is less than pellucid. It offers no definition except to say tautologically that "section 1447(c)'s requirement that '[a] motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal' applies only to motions for remand on the basis of any defect in removal procedure." 933 F.2d at 1213 (emphasis in original). But it expressly says it

does not agree with the reading that "all non-jurisdictional motions for remand" must be made within the 30-day period, 933 F.2d at 1213, and its holding, that a motion for remand based on a forum-selection clause made 54 days after removal is timely, cannot be reconciled with the interpretation the Fifth Circuit has given to § 1447(c).

The Fifth Circuit is correct. Its reading of the statute is supported by the statutory language, the legislative history, and by sound policy.

The language of the new statute is not so clear that he who runs may read,³ but it is comprehensible enough. The most natural reading of a statute that speaks of procedure in one sentence and subject matter jurisdiction in the next is that the two are being contrasted and that "procedure" is being used to speak to the process by which cases are brought to the federal court rather than with whether they are cases a federal court has power to hear. The Fifth Circuit is squarely on the mark when it says that "the word 'procedural' in section 1447(c) refers to any defect that does not involve the inability of the federal district court to entertain the suit as a matter of its original subject matter jurisdiction." Pet. 8a.

³ Surely the Third Circuit is jesting when it says "section 1447(c) could not be clearer." 933 F.2d at 1213. It would be clearer if the first sentence read "A motion to remand the case on any ground existing at the time of removal other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under § 1446(a)." It would be clearer, in the direction that petitioners wish Congress had gone, if the first sentence had spelled out in terms the specific defects that are to be brought within the 30-day limit.

Any other reading would leave a glaring *casus omissus*. If "defect in removal procedure" does not encompass all nonjurisdictional defects existing at the time of the removal, then there are some nonjurisdictional defects that are not covered by § 1447(c) at all. They would not be within the first sentence because they are not within the artificially narrowed concept of "procedure" and they would not be within the second sentence because by hypothesis they do not go to subject matter jurisdiction. This would include remand because of a forum-selection clause.⁴ It would include remand because one or more of the defendants was a citizen of the forum state, contrary to 28 U.S.C. § 1441(b), or because defendant was a federal agency rather than a federal officer, contrary to 28 U.S.C. § 1442. It would include remand because the case is one that Congress has said may not be removed, as with FELA, Jones Act, and workmen's compensation, 28 U.S.C. § 1445(a), (c), and as plaintiff argues is true of DOHSA. It is inconceivable that a Congress in possession of its senses would prescribe by statute a 30-day rule for remand of one class of cases and an "at any time" rule for remand of another class of cases and would remain silent on when remand may be sought in the large and important class of cases it left in the middle. This Court has recognized that where the literal meaning of a statutory term would "compel an odd result" or "the result it apparently decrees is difficult to

⁴ The Third Circuit acknowledged as much. "Section 1447(c) neither prohibits nor authorizes the order of remand here, based on a forum selection clause. It simply does not address the issue." 933 F.2d at 1215.

fathom", judges can look beyond the naked text. *Public Citizen v. Department of Justice*, 491 U.S. 440, 454-455 (1989). In this case that is not necessary. The reading given the statute by the Fifth Circuit is the most natural reading of the words.

That natural reading is fully supported – indeed compelled – by the legislative history. Although petitioners have included the legislative history in their appendix, Pet. 29a, the text of their petition makes no reference to it. That is wholly understandable. The legislative history demonstrates that Congress intended exactly the construction the Fifth Circuit has given the statute – and thus exactly the opposite of the construction petitioners would like.

Subsection (c) amends 28 U.S.C. 1447(c) and adds a new subsection (e). Section 1447(c) now appears to require remand to state court if at any time before final judgment it appears that the removal was improvident. So long as the defect in the removal procedure does not involve a lack of federal subject matter jurisdiction, there is no reason why either State or Federal courts, or the parties, should be subject to the burdens of shuttling a case between two courts that each have subject matter jurisdiction. There is also some risk that a party who is aware of a defect in removal procedure may hold the defect in reserve as a means of forum shopping if the litigation should take an unfavorable turn. The amendment provides a period of 30 days within which remand must be sought on any ground other than lack of subject matter jurisdiction. The amendment is written in terms of a defect in "removal procedure" in order to avoid

any implication that remand is unavailable after disposition of all federal questions leaves only State law questions that might be decided as a matter of ancillary or pendent jurisdiction or that instead might be remanded.

Report of the House Judiciary Committee, H.R.Rep. No. 889, 100th Cong., 2d Sess. 72, *reprinted in* 1988 Cong.&Adm.News 5982, 6033.

Congress was critical of the former rule, under which remand on the ground that removal was improvident could be sought at any time before final judgment. "So long as the defect in removal procedure does not involve a lack of federal subject matter jurisdiction," cases should not shuttle between two courts with concurrent jurisdiction. "The amendment provides a period of 30 days within which remand must be sought on any grounds other than lack of subject matter jurisdiction." As the final sentence of the Report shows, the amendment was "written in terms of a defect in 'removal procedure' " in order to avoid any implication that remand is unavailable after disposition of all federal questions, with only state claims remaining, the situation in which the very recent decision in *Carnegie-Mellon University v. Cohill*, 484 U.S. 343 (1988), had for the first time recognized a power to remand.

The Third Circuit thought that the final sentence in the Committee Report showed that the Judiciary Committee did not mean what it said in the preceding sentence, when it had said that the 30-day rule applies to remand "on any ground other than lack of subject matter jurisdiction". 933 F.2d at 1213. The supposed contradiction vanishes when "removal procedure" is read to refer to the

process by which cases are removed to federal court. On this view § 1447(c) speaks comprehensively – as have its predecessors, going back to 1887, see note 2 above – to all defects, jurisdictional and nonjurisdictional, that would have barred removal in the first instance. It leaves untouched only cases in which remand is discretionary with the court after the case has been properly removed, as in *Carnegie-Mellon* or under 28 U.S.C. §§ 3567(c) or 1441(c).⁵

The reading that the Fifth Circuit gave the statute is supported by sound policy. Indeed, the Third Circuit recognized as much.

It is true that Chesapeake's position has solid policy reasons behind it. As the House Report recognizes, it is a waste of everyone's time for cases to be shuttled back and forth between two courts that have jurisdiction, and the waste is exacerbated where the case has been removed, litigated at the federal level for quite some time, and then, due to a late-raised issue of defective removal, remanded. Moreover, the House Report also recognizes the unsavory possibility of a plaintiff keeping a defect in removal on reserve as an escape hatch should the federal litigation begin to bode ill. These policy concerns counselling a short time limit for motions

⁵ See also *Massachusetts v. V & M Management, Inc.*, 929 F.2d 830 (1st Cir. 1991), holding that where the district court had concluded it had subject matter jurisdiction, but declined to exercise that jurisdiction, the remand was not for "any defect in the removal procedure" and was not controlled by § 1447(c).

to remand no doubt apply to all non-jurisdictional grounds for remand, including a forum selection clause.

933 F.2d 1213 n.8. The Third Circuit seemed to take comfort in the discretion it thinks courts should have to "deny as untimely a non-procedural-defect, non-jurisdictional motion to remand if made at an unreasonably late stage of the federal litigation." 933 F.2d at 1213-1214 n.8. Even if such discretion exists – and the text cited by the Third Circuit for the existence of such discretion does not support that proposition – Congress wisely thought it better to state its own precise and comprehensive rule rather than to leave these matters in the limbo of a questionable undefined discretion. Questions of which court is to hear a case should be subject to a Bright Line Policy. CHAFEE, *SOME PROBLEMS OF EQUITY* 311-316 (1950). See *Navarro Savings Assn. v. Lee*, 446 U.S. 458, 464 n.13 (1980) ("Jurisdiction should be as self-regulated as breathing . . .").

Congress provided a bright line that will prevent the abuses to which the prior statute was subject. The courts should not dim that line or make it serpentine by a strained construction. "[I]t will not do for us to tell Congress, 'We see what you were driving at but you did not use choice words to describe your purpose.'" *United States v. Union Pacific R. Co.*, 353 U.S. 112, 118 (1957).

The conflict petitioners decry is with a single decision of the Third Circuit. The three other cases petitioners cite, *Pet. 7*, are inapposite. *State v. Ivory*, 906 F.2d 999, 1000 n.1 (4th Cir. 1990), merely restated the statutory language in the course of holding that remand for lack of subject matter jurisdiction was proper at any time. In *Air-Shields, Inc. v. Fullum*, 891 F.2d 63 (3d Cir. 1989), the court held

that the amended version of § 1447(c) applied to pending litigation and barred remand seven months after removal of a case in which removal had been untimely. Finally, *Corcoran v. Ardra Ins. Co.*, 842 F.2d 31 (2d Cir. 1988), was decided eight months before § 1447(c) was amended and has absolutely nothing to say about the amendment.

It is not every conflict between circuits that merits the attention of this Court. The great national issues that properly command the Court's time would be crowded out if every isolated misreading of a jurisdictional statute by a single court of appeals had to be set right here. The interpretation the Fifth Circuit gave the statute is supported by the language of the statute, by the legislative history, and by solid policy arguments. It has since been independently adopted by the Seventh Circuit. See *Western Securities Co. v. Derwinski*, 937 F.2d 1276 (7th Cir. 1991), holding that although a suit against the Veterans' Administration is not removable under 28 U.S.C. § 1442(a)(1), the objection was waived by failure to raise it within 30 days of removal since the suit could have been brought originally in federal court. The Fifth Circuit's interpretation is supported by the commentators. See the extensive quotations from 1a MOORE & RINGLE, MOORE'S FEDERAL PRACTICE ¶¶ 0.157, 0.168, 0.169 in the decision below, Pet. 6a-10a, and the quotations not only from the Moore treatise but also from Siegel, *Commentary on 1988 Revision*, 28 U.S.C.A. § 1447(c) (West Cum.Supp. 1991), and 14A WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 3739 (Supp. 1991), in *Shell I*, 932 F.2d at 1520-1522. That the Third Circuit in one case reached the wrong result does not merit the time of this Court.

2. There Is No "Saving to Suitors" Issue.

Contrary to what petitioners argue, Pet. 11-16, there is no issue here of whether a federal court can exercise admiralty jurisdiction, over a "saving to suitors" case removed without diversity. There is an issue, left open by the Fifth Circuit, whether DOHSA cases are removable as federal-question cases. That issue is not before this Court. See note 1 above.

The saving-to-suitors clause does not apply to DOHSA cases. The clause preserves common-law remedies that the state are competent to give. There was no common-law remedy for wrongful death, and the saving-to-suitors clause does not authorize suit in state courts to obtain a remedy under DOHSA. DOHSA is not a common-law remedy. It is a federal statutory remedy. The statute created a remedy that did not exist at common law. Parties are entitled to bring DOHSA actions in state court because of the provisions of § 7 of the Act, 46 U.S.C. § 767. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986).

The Fifth Circuit held nothing on whether either a savings-clause case or a DOHSA case can be removed to federal court. It held that petitioners had waived their right to object to removal. It further held that the case was within the subject-matter jurisdiction of the federal court because it could have been brought there. That DOHSA cases can be brought in federal court, and on the admiralty side, is a proposition about which there is no conflict whatever. Indeed, until *Tallentire* the issue had been whether federal jurisdiction was exclusive in these

cases. There is nothing in petitioner's Point II worthy of this Court's attention.

CONCLUSION

There is no reason to grant a writ of certiorari in this case. The decision of the Fifth Circuit is correct and the conflict with a single decision of one other court is not one that needs to be resolved here. The writ should be denied.

Respectfully submitted,

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